

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES MANNING JR.
Claimant

VS.

GENERAL MOTORS CORPORATION
Self-Insured Respondent

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Docket No. 1,016,135

ORDER

Claimant requests review of the June 22, 2006 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on October 3, 2006.

APPEARANCES

Steven C. Alberg of Olathe, Kansas, appeared for the claimant. Peter J. Chung of Kansas City, Missouri, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. The Award fails to note however, that the parties stipulated that Dr. Henderson's medical records were part of the evidentiary record and that Dr. Henderson would "testify about claimant's disability and restrictions from the accident at General Motors which would confirm, within a reasonable degree of medical certainty, the opinions of task loss as represented in the report of Voc Expert, Dick Santner."¹ At oral argument before the Board, the parties agreed they had also stipulated that claimant's pre-injury gross average weekly wage was \$1,400.

ISSUES

The Administrative Law Judge (ALJ) adopted the court ordered independent medical examiner's opinion and awarded the claimant compensation for a 35 percent whole person functional impairment. He further determined that there was a lack of evidence regarding task loss which precluded a work disability award.

¹ Stipulation Agreement filed March 24, 2006.

The claimant requests review of the nature and extent of disability. Claimant notes the parties had stipulated that Dr. Henderson would testify claimant had a 100 percent task loss. Consequently, the ALJ erred in failing to accept that task loss evidence. Claimant requests the Board to find claimant suffered both a 100 percent wage and task loss and is permanently and totally disabled.

Respondent argues that the ALJ has the discretion to determine if the stipulation meets the requirements in K.S.A. 44-510e and therefore, the ALJ's Order should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed claimant suffered work-related repetitive trauma to his cervical spine as a result of performing his job duties as a quality control assurance team leader. As part of his job duties claimant would assist in tearing apart automobiles in order to check the chassis welds. This activity required significant pushing and pulling using the "jaws of life" to cut the vehicle apart.

Claimant began to experience headaches, difficulty walking and upper extremity numbness. Ultimately, diagnostic testing revealed spinal cord compression at C3-4. An anterior cervical fusion was performed on March 15, 2004. The claimant continues to have difficulty walking as well as continued numbness in his hands. He also notes spastic leg movements with occasional loss of balance and falls.

The court ordered independent medical examiner, Dr. Terrence Pratt, confirmed claimant has persistent cervical myelopathy with partial loss of function of his lower extremities as well as rapid alternating motion difficulties or coordination difficulties in the upper extremities. The doctor utilized DRE categories and concluded that claimant most appropriately fit Category V which resulted in a 35 percent whole person functional impairment. The doctor further noted that if an ambulatory assistive device was required then claimant's functional impairment would consist of Category IV combined with Category VI. Although claimant sometimes required the use of a walker he did not present for his examination using the device and so the doctor concluded Category V was appropriate.

The parties stipulated Dr. John H. Henderson's permanent restrictions for claimant included limited reaching with his left or right arm to less than 5 minutes, limit grip/grasp with left hand to less than 5 minutes, limit grip/grasp with right hand to less than 10 minutes, sit full time while working, limit walking to less than 1 hour per day, no squatting or kneeling, no stair or ladder climbing, limited neck movement, ground level work only, no

line work, no use of palm buttons, foot pedals, torque guns, sanders, vibrating tools, spray/sealant guns, hammers, mallets, sledges, no lifting over 5 pounds and no operating cranes/power vehicles.

The claimant was evaluated by vocational rehabilitation counselor Richard W. Santner. Mr. Santner developed a task list from the jobs claimant had in the 15 years before his work-related injury. Mr. Santner also reviewed the medical records and restrictions provided by the various doctors who had treated claimant including Dr. Henderson. Mr. Santner opined that claimant's physical limitations eliminated his ability to perform any tasks and that claimant was realistically unemployable. He testified:

Q. When you look at a person's restrictions, you look at all the doctors that have given restrictions. You just don't isolate it to my doctor or, you know, their doctor, or one doctor. You look at all the doctors?

A. That's correct.

Q. And then you come to an opinion on each of those?

A. That's correct.

Q. And in this case, looking at all the doctors' opinions, it's your opinion that, what?

A. He's not employable.

Q. Under any of the doctors?

A. Under any of them.²

The parties further stipulated that Dr. Henderson would "testify about claimant's disability and restrictions from the accident at General Motors which would confirm, within a reasonable degree of medical certainty, the opinions of task loss as represented in the report of Voc Expert, Dick Santner."³

Finally, the claimant testified that because of his ongoing physical problems he did not think he could work.

Workers compensation proceedings have been and remain adversarial proceedings.⁴ In a workers compensation proceeding, the claimant has the burden of

² Santner Depo. at 19.

³ Stipulation Agreement filed March 24, 2006.

⁴ *Roberts v. J.C. Penney Co.*, 263 Kan. 270, 281, 949 P.2d 613 (1997).

proof to establish the right to an award of compensation and to prove the various conditions on which the claimant's right depends.⁵ The "burden of proof" is the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."⁶

The parties stipulate to issues not in dispute and the remaining disputed issues require the presentation of evidence. And the parties must be free to rely on stipulations until leave is granted to withdraw the stipulation. The parties must be bound by their stipulations unless for a good reason shown the Administrative Law Judge allows a party to withdraw the stipulation and thereafter affords the opposing party reasonable opportunity to present evidence on the issue in question.⁷

In this case the parties filed a Stipulation Agreement on March 24, 2006. The Stipulation Agreement provided:

COME NOW the Claimant and Respondent and Insurance Carrier and hereby stipulate and agree that the medical records of Dr. Henderson will be admitted into evidence without further foundation or cross-examination and further stipulate and agree that Dr. Henderson would testify about claimant's disability and restrictions from the accident at General Motors which would confirm, within a reasonable degree of medical certainty, the opinions of task loss as represented in the report of Voc Expert, Dick Santner. That a copy of all stipulated records referred to herein are attached hereto and made a part hereof and shall be admitted by the court into evidence as set forth herein.

Both parties' submission letters to the ALJ referenced the stipulation and it does not appear that either party requested that the stipulation be withdrawn. Accordingly, it was error for the ALJ to disregard the stipulation and conclude there was no evidence from a physician to establish task ability.

The claimant argues that he is permanently and totally disabled. Permanent total disability exists when an employee, on account of his or her work-related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment.⁸

⁵ K.S.A. 44-501(a).

⁶ K.S.A. 2004 Supp. 44-508(g).

⁷ See *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, 512 P.2d 438 (1973) and *Scammahorn v. Gibraltar Savings & Loan Assn.*, 197 Kan. 410, 416 P.2d 771 (1966).

⁸ K.S.A. 44-510c(a)(2).

An injured worker is permanently and totally disabled when rendered “essentially and realistically unemployable.”⁹ The injuries claimant suffered do not raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2); therefore, it is the responsibility of the trier of fact to determine the existence, extent and duration of an injured worker’s incapacity.¹⁰

“The existence, extent and duration of an injured workman’s incapacity is a question of fact for the trial court to determine.”¹¹ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.¹²

Dr. Henderson’s restrictions are part of the evidentiary record and by agreement it was noted that the doctor would adopt the task loss opinions of Mr. Santner. And, as previously noted, Mr. Santner concluded claimant had lost all of his task performing ability and was essentially unemployable. The claimant further testified that he did not think he could engage in substantial gainful employment. Based upon the medical evidence, Mr. Santner’s and claimant’s testimony, the Board finds claimant has met his burden of proof to establish that he is permanently and totally disabled.

The claimant is entitled to reimbursement of the co-pay amounts made to his personal health insurance provider upon presentation of itemized statements and respondent is further ordered to reimburse claimant’s personal health insurance carrier for the authorized medical treatment claimant was provided including the surgery.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated June 22, 2006, is modified to reflect claimant is permanently and totally disabled.

The claimant is entitled to permanent total disability compensation at the rate of \$440 per week not to exceed \$125,000 for a permanent total general body disability.

⁹ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

¹⁰ *Id.* at 112.

¹¹ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 803, 522 P.2d 395 (1974).

¹² *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

As of November 22, 2006, there would be due and owing to the claimant 141.86 weeks of permanent total disability compensation at the rate of \$440 per week in the sum of \$62,418.40 for a total due and owing of \$62,418.40, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$62,581.60 shall be paid at \$440 per week until fully paid or until further order of the Director.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval. Additionally, it is noted that there is an attorney lien filed in this matter and that issue also needs to be resolved.

IT IS SO ORDERED.

Dated this _____ day of November 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Steven C. Alberg, Attorney for Claimant
Peter J. Chung, Attorney for Respondent
John M. Duma, Attorney at Law
Robert H. Foerschler, Administrative Law Judge